

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 300 OF 2003
WITH
CIVIL APPLICATION NO. 352 OF 2003

Shri Ganpati Rama Borate @
Jagadale and ors. ..Appellants

Vs.

Pandurang Daji Borate and ors. ..Respondents

Mr. Dilip Bodake for appellants.
Mr. Rahul S. Kate for respondent Nos.1B, 1C and 2.

CORAM: B.H. MARLAPALLE, J.

Date : April 10, 2007.

P.C.:

1. Heard Mr. Bodake the learned counsel for the appellants. Mr. Kate appears for respondent nos.1B, 1C and 2.

2. The appellants were the plaintiffs in Regular Civil Suit No.67 of 1986 filed for injunction simpliciter. They claimed that the suit land admeasuring about 0.6 R. was gifted to them by Putalabai and said Gift Deed was registered on 4/11/1965. They also claimed that on the basis of the said Gift Deed their names were entered in the record

of rights and they were in possession of the suit property. However, on 1/3/1986 when they were about to cut some banian tress from the suit property, the defendants obstructed them and, therefore, they filed the suit. The defendants filed their Written Statement at Exh.23 and denied that Smt.Putalabai had signed a valid Gift Deed, she was capable of gifting away the agricultural land, more so when she was a widow prior to 1937 and the suit land was the Mirashi tenancy land. The trial court on the basis of the oral and documentary evidence held that the plaintiffs had proved their title over the suit property and that they were in possession. It further held that the plaintiffs had proved the obstruction by the defendants and consequently the suit was decreed in favour of the plaintiffs. The defendants approached the Lower Appellate Court in Regular Civil Appeal No. 235 of 1994 and the same has been allowed by the learned 2nd Ad-hoc Additional District Judge at Satara vide his Judgment dated 17/7/2002. The Lower Appellate Court, on appreciation of the evidence held that the plaintiffs could not prove their title as well as possession over the suit land and, therefore,

there was no question of having any obstruction by the defendants. Consequently, the suit was dismissed and the decree passed by the trial court was set aside.

3. The plaintiffs examined plaintiff no.1 Ganpati Rama Borate and the defendants had examined Baban Pandurang Borate. The Gift Deed was brought on record at Exh.62 was undoubtedly registered and solely on that ground the trial court accepted that to be a valid document. However, the Lower Appellate Court referred to the provisions of Section 123 of the Transfer of Property Act and held that unless the attesting witnesses were examined by the plaintiffs in support of the Gift Deed, it could not be held to be valid so as to transfer the immovable property. It noted that no such witnesses or the attesting witnesses were examined by the plaintiffs before the trial court. In addition, the plaintiffs had vaguely stated that they were nephews of Smt. Putalabai. No further details were provided beyond a bald statement made in the plaint. Thirdly, the suit land was a Mirashi tenanted land and unless permission was obtained from the Collector under Section 63 of the

Bombay Tenancy and Agricultural Lands Act, 1948, it could not have been alienated or handed over to any third party by Smt. Putalabai. On these three grounds the Lower Appellate Court held that the title of the plaintiffs over the suit land was wrongly accepted by the trial court and, therefore, the findings on issue no.1 recorded by the trial court were rejected.

4. On the point of possession, the plaintiffs relied upon the Mutation Entry at Exhs.54 and 55. This was effected on 4/10/1966 and solely on the basis of the Gift Deed. Once the Gift Deed was found to be not proved and not meeting the requirements of Section 123 of the Transfer of Property Act, there was no question of valid transfer of the suit land to the plaintiffs. In addition, the plaintiffs relied upon 7x12 extract at Exh.9 and it was for the year 1984-85. This singular entry could not be accepted. The Lower Appellate Court referred to the provisions of Section 90 of the Indian Evidence Act regarding presumption as to the document of 30 years old. It noted that the suit was filed on 7/3/1986 and the Gift Deed was

registered on 4/11/1965 i.e. about 21 years prior in time and even when the suit was decided the period of 30 years had not expired i.e. on 6/4/1994. It was under these circumstances, the Lower Appellate Court held that the trial court fell in error in relying upon Section 90 of the Evidence Act so as to accept the Gift Deed at Exh.62 by drawing presumption.

5. Thus, the view taken by the Lower Appellate Court is a possible view and it cannot be said that the Lower Appellate Court committed any illegality or perversity. This second appeal, therefore, does not involve any substantial question of law for consideration.

6. The appeal is hereby dismissed. It is, however, made clear that if the plaintiffs decide to file a fresh suit on a fresh cause of action, it will have to be considered on its own merits.

7. Civil Application No. 352 of 2003 does not survive and the same shall stand disposed as such.

:6:

(B.H. Marlapalle, J.)